

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1095

To be argued by
JONATHAN J. SILBERMANN

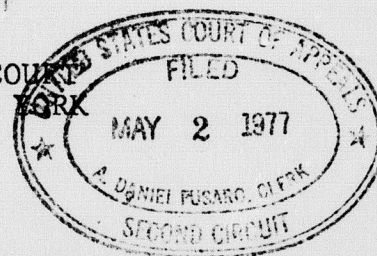
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
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Plaintiff-Appellee,
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-against-
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RICHARD TRICA,
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Defendant-Appellant.
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Docket No. 77-1095

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Whether the district court's failure to hold a hearing to determine whether the medication administered to appellant by officials at MCC prevented his knowing entry of a guilty plea was error requiring a remand to determine that question.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Edward R. Neaher) rendered on January 7, 1977, convicting appellant Richard Trica, after a plea of guilty, of bank robbery, in violation of 18 U.S.C. §2113(a) (Count One), and sentencing him to ten years' imprisonment pursuant to 18 U.S.C. §4205(b) (2).

By order dated February 24, 1977, this Court appointed The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

On July 19, 1976, an indictment¹ was filed charging appellant Richard Trica and two other persons with bank robbery (Count One) (18 U.S.C. §2113(a)(2)) and conspiracy to commit that crime (Count Two) (18 U.S.C. §371).

During the course of a pretrial suppression hearing held approximately three and one-half months later, appellant's trial counsel asked for a short recess for the purpose of

¹The indictment is B to the separate appendix to appellant's brief.

conferring with appellant² (122). After a short discussion, trial counsel requested that appellant be allowed to withdraw his plea of not guilty and to enter a plea of guilty to Count One of the indictment³ (122-124).

The district judge then questioned appellant about his background and his ability to understand the proceedings. After determining that appellant had a seventh grade education (125), the district judge inquired about appellant's involvement with narcotics.

In response to questioning, appellant indicated that he had used narcotics immediately prior to his arrest on July 9, 1976⁴ (127). The following colloquy then occurred:

THE COURT: ... Since that time, I take it, not necessarily of your own free will, you have not been using narcotics, except to the extent that they may have been administered during your stay in federal custody?

THE DEFENDANT RICHARD TRICA: Yes.

²As a result of a motion to suppress identification testimony and evidence seized from appellant's apartment, a hearing was held on November 8, 1976, to determine the question. Defense counsel's request for a recess occurred after the district court ruled that the identification procedures were not impermissibly suggestive (84-92) and prior to completion of testimony on the issue of the seizure of evidence. (Numerals in parentheses refer to pages of the transcript dated November 8, 1976.)

³The transcript of appellant's guilty plea proceeding is C to the separate appendix to appellant's brief.

⁴Appellant was arrested on July 9, 1976. He remained incarcerated at the Metropolitan Correctional Center ("MCC") from that time until after the sentencing procedure.

THE COURT: You were given methadon for a time?

THE DEFENDANT: Yes.

THE COURT: And detoxified, as they put it, in that fashion; is that right?

THE DEFENDANT: Yes.

THE COURT: Now, either this morning or yesterday, was anything administered to you by either -- you know, either methadon, or anything of that nature, that makes it difficult for you to understand clearly what I am saying to you here?

THE DEFENDANT: No.

THE COURT: Now, are you, aside from narcotics, have you recently been under the care of any doctor for any kind of condition, physical or mental?

THE DEFENDANT: Yes.

THE COURT: Yes?

THE DEFENDANT: No.

THE COURT: Yes?

THE DEFENDANT: No.

THE COURT: The answer is "No"?

THE DEFENDANT: No.

(128).

When questioned about what he did on June 16, 1976, at the Hamilton Federal Savings & Loan Association, appellant, who had been sworn, replied:

I needed drugs, your Honor. I ran into the bank and demanded money and I got it.

(137).

The district court then asked whether appellant knew what he was doing at the time, and appellant stated: "I knew I needed drugs, Your Honor" (138). After additional colloquy as required by Rule 11 of the Federal Rules of Criminal Procedure, the district court accepted the guilty plea.⁵

On January 5, 1977, appellant moved to withdraw his plea of guilty on the ground that, at the time of the plea procedure, appellant had been given medication by MCC officials, which prohibited him from understanding the proceedings and knowingly pleading guilty (Transcript of January 5, 1977, at 5, 7). Without holding a hearing or examining the presentence report,⁶ the district judge denied the motion. After considering the transcript of the prior plea proceeding, the judge stated:

I have observed this defendant on any number of occasions, and in my opinion at all times, he knows what he's been doing. I'm

⁵ During the plea proceeding, the district court elicited approximately 71 responses from appellant. Of those, approximately 59 were "yes," "no," or answers requiring no more than one or two words.

⁶ At the time of the motion to withdraw the guilty plea, Judge Neaher indicated that he had refrained from reading the presentence report so as not "to be prejudiced by anything ... found there" (Transcript of January 5, 1977, at 10). Trial counsel also stated that he had not yet reviewed the report (Transcript of January 5, 1977, at 12). The transcript of the plea withdrawal motion, dated January 5, 1977, is D to the separate appendix to appellant's brief.

satisfied that his plea was voluntarily made and my opinion is the excuse now offered is not worthy of belief, and accordingly, I am going to deny the application.

(Transcript of January 5, 1977, at 8.)

Two days later, appellant was sentenced to ten years' imprisonment. In light of the indication given in the presentence report that appellant had suffered from a "serious drug habit" for many years (Transcript of January 7, 1977, at 6), the district court recommended that appellant be given "extensive and intensive drug therapy and psychological guidance and attention as appears to be necessary" (Transcript of January 7, 1977, at 8).

The presentence report confirmed appellant's prior allegation of drug addiction, as well as the fact that he had been given medication at MCC. Specifically, the report indicated that appellant had been using drugs since 1959; that he had been a heroin addict since 1966; and that medical personnel at MCC, where appellant was incarcerated during the proceedings, had administered drugs to appellant. The presentence report stated that appellant "receives tranquillizing medication for nervousness and insomnia." Further, the report indicated that "[w]hile confined, [appellant] has irregularly displayed inappropriate and extremely withdrawn behavior" (Presentence report at 18).

ARGUMENT

THE DISTRICT COURT'S FAILURE TO HOLD
A HEARING TO DETERMINE WHETHER THE
MEDICATION ADMINISTERED TO APPELLANT
PREVENTED HIS KNOWING ENTRY OF A
GUILTY PLEA WAS ERRONEOUS AND REQUIRES
A REMAND TO DETERMINE THAT QUESTION.

On November 8, 1976, appellant entered a guilty plea to bank robbery. During the plea proceeding, appellant indicated that he had been addicted to narcotics but had been detoxified since his arrest and subsequent incarceration. When asked whether he was still under medical care, appellant initially answered "yes." The following colloquy then occurred:

THE COURT: Yes?

THE DEFENDANT: No.

THE COURT: Yes?

THE DEFENDANT: No.

THE COURT: The answer is "No"?

THE DEFENDANT: No.

(128-129).

Prior to sentence, appellant requested that his plea be withdrawn, specifically alleging that medical personnel at MCC had given him medication that precluded his comprehension of the plea proceedings. Despite the fact that this allegation was, at least in part, corroborated by the presentence

report,⁷ and not disproved by the inconclusive colloquy quoted above indicating that appellant might still be under medical care, the district court denied this request without even consulting the available medical records of MCC or holding a hearing. This failure now requires a remand to determine the question. Fontaine v. United States, 411 U.S. 213 (1973); Sanders v. United States, 373 U.S. 1, 20 (1963); United States v. Miranda, 437 F.2d 1255 (2d Cir. 1971); Catalano v. United States, 298 F.2d 616 (2d Cir. 1962); Nolan v. United States, 466 F.2d 522, 524 (10th Cir. 1972); Ellison v. United States, 324 F.2d 710 (10th Cir. 1963).

Generally, a defendant's claim of mental incompetence at the time of a guilty plea must be litigated at a hearing where the facts can be determined. United States v. Miranda, *supra*, 437 F.2d at 1258; Catalano v. United States, *supra*, 298 F.2d 616; Nolan v. United States, *supra*, 466 F.2d at 524; Lopez v. United States, 439 F.2d 997 (9th Cir. 1971); see generally, O'Neill v. United States, 486 F.2d 1034 (2d Cir. 1973); United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970).

Claims of mental incompetency at the time of ... [a] plea of guilty have been particularly troublesome. Although in some cases these can be disposed of without a hearing, ordinarily a hearing will be required.

2 Wright, FEDERAL PRACTICE & PROCEDURES, §599 (1969).

⁷ The presentence report reflected that appellant had been receiving tranquilizers.

A hearing is especially critical when the allegation involves a failure to understand the procedures due to drug abuse.

However regular the proceedings at which he [appellant] ... pleaded guilty might appear from the transcript, it still might be the case that [he] did not make an intelligent and understanding waiver of his constitutional rights. [Citations omitted.] For the facts on which [appellant's] claim ... is predicated are outside the record.... Whether or not [appellant] was under the influence of narcotics [here, other drugs] would not necessarily have been apparent to the trial judge.

Sanders v. United States,
supra, 373 U.S. at 19-20:

See also Fontaine v. United States, supra, 411 U.S. at 215.

This Court has only recently held that the presentence withdrawal of a guilty plea is permitted when the defendant "satisf[ies] the trial judge that there are valid grounds for withdrawal, taking into consideration any prejudice to the government. United States v. Lombardozzi, 436 F.2d 878, 881 (2d Cir.), cert. denied, 402 U.S. 908 (1971); United States v. Fernandez, 428 F.2d 578, 580 (2d Cir. 1970);" United States v. Michaelson, Doc. No. 76-1559, slip op. 2615, 2618 (2d Cir., March 31, 1977). In this case, prior to sentence appellant presented a valid basis for withdrawing his plea -- a lack of understanding due to drug intoxication. Since the only question at that stage of the proceedings was whether a hearing should have been granted to resolve appellant's allegations, no prejudice could have inured to the Government.⁸ A fortiori,

⁸These facts distinguish this Court's decision in United

appellant should have been given the opportunity to establish his allegations, which were based on facts outside the record, and satisfy his burden.

Moreover, when confronted by the facts in appellant's presentence report which confirmed appellant's contention that officials at MCC were administering medication to him, the district court, at a minimum, should have consulted appellant's institutional records to determine whether the drugs given to appellant could have impaired his ability to understand the proceedings. Thus, in light of appellant's allegations and the information available, a hearing should now be held to determine appellant's competence at the time of his guilty plea. United States v. Saddler, 531 F.2d 83 (2d Cir. 1976); United States v. Miranda, supra; Sanders v. United States, supra.

(Footnote continued from the preceding page)

States v. Falu, 421 F.2d 687 (2d Cir. 1970), which involved a post-sentence plea withdrawal. Moreover, in Falu, the defendant asserted that he was suffering the effects of drug addiction from which he had already been detoxified. Here, in contrast, appellant alleged that medication had been administered to him by MCC officials -- an allegation supported by the presentence report -- and that the medication prohibited his knowing entry of a guilty plea. In any event, to the extent that Falu is inconsistent with this Court's decision in United States v. Miranda, supra, the later Miranda case controls.

CONCLUSION

For the foregoing reasons, the case must be remanded to the district court for a hearing to determine whether appellant was competent at the time of entry of his guilty plea.

Respectfully submitted,

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CERTIFICATE OF SERVICE

May 2, 1977

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Nathan Silbermann